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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948

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| **PEOPLE OF THE STATE OF ILLINOIS, ex rel. TONY MARINO,** Petitioner, vs. **JOSEPH E. RAGEN, Warden, Illinois State Penitentiary, Joliet, Illinois,** Respondent. | **Misc. No. 30** |

## PETITION FOR REHEARING.

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## PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Petitioner was granted a hearing in the trial court in habeas corpus. When relief was denied he mailed his own petition for certiorari to this Honorable Court. The decision is reported in 332 U.S. 561.

Then the trial court sent petitioner back to the penitentiary.

A number of avenues have been sought for relief since.

A petition for mandamus, No. 30855 and one for certiorari, No. 30856 was denied by the Illinois Supreme Court. We did not pursue these adverse decisions, in Nos.

30855 and 6, for the reason that we were quite certain that this Honorable Court would care nothing for the exact procedure in Illinois—so long as some method remained. That is we then thought a remedy remained. Begins to look as if we were in error. We did not anticipate that the Illinois Supreme Court would await the action of this Court. In fact we thought it would be the other way around. We requested the Clerk of this Court to hold up our petition for certiorari in Misc. 30 until we could obtain a decision in the Illinois Supreme Court. Then when we learned, indirectly, that the Illinois Supreme Court was passing from term to term waiting upon this Honorable Court, we hastened to request the Clerk to present our petition in No. 30 Misc.

A writ of error, No. 30804 was allowed by the Illinois Supreme Court and also a petition for habeas corpus No. 30854. These cases are pending, having been submitted on briefs and oral argument and have been passed from term to term since 1948.

By way of the writ of error pending in the Illinois Supreme Court Marino makes an attack upon the original judgment. He is limited to the common law record. Your Honors already know what that means. The evidence heard in the trial court will not be considered for lack of a proper bill of exceptions. The record made by the clerk is regarded as the truth. Our Illinois Supreme Court in the writ of error will not consider what has happened since in habeas corpus proceedings.

Now that your Honors have denied certiorari, we expect a decision in the Illinois Supreme Court at the present May Term. That is we might have gotten a decision from the Illinois Supreme Court if we had not filed this petition for rehearing.

We pray not only that your Honors reconsider and rehear our case—we submit that it is important to have your Honors retain jurisdiction.

If relief is granted by the Illinois Supreme Court, we shall dismiss this petition for certiorari Misc. No. 30.

If relief is denied by the Illinois Supreme Court, we shall petition here for certiorari and move to consolidate.

The petition now before your Honors, No. 30, on this petition for rehearing, seeks relief from the action of the trial court. In some instances the trial court is a court of last resort. It is possible that at the present May term, the Illinois Supreme Court might hold that the decision of the trial court was final, and not to be reviewed by the Illinois Supreme Court, in the habeas corpus. In such an event petitioner will be left without any review of the action of the trial court. Unless, of course, the denial of certiorari here in No. 30 means that the trial court was correct in its defiance of the mandate of this Honorable Court.

It seems as if we should be entitled to an opinion here without first being caught in any blind alley or in any labyrinth. If the Illinois Supreme Court denies relief—we submit that your Honors should then in fairness be in a position to review both the Supreme Court and the trial court. Your Honors should not now cut off all jurisdiction over the trial court before hearing from the Illinois Supreme Court.

We hope that we are not compelled to fall between two stools.

Now we feel it our duty to notify the Justices of the Illinois Supreme Court of the filing of this petition for rehearing and to send a copy. It will not surprise us if the Illinois Supreme Court again passes the pending cases.

Next term is in September. Perhaps we have put Marino upon another merry-go-round by this petition for rehearing. Hope springs eternal. Justice crushed should rise somewhere.

If your Honors denied certiorari here on May 2nd because your Honors believed that Marino has a remedy in Illinois that is unfortunate. Because the habeas corpus pending in the Illinois Supreme Court is an original action, filed after the trial judge sent Marino back. Every prisoner has a right to a succession of applications. The first adverse decision is not controlling as a matter of law. But as a practical matter we are afraid that the adverse decision of the trial court, followed by denial of certiorari here, will be an effective bar. Our Illinois Supreme Court will regard denial of certiorari here as an affirmance of the trial judge by a court superior to the Illinois Supreme Court.

The effect of all of this which we fear is—that by denying certiorari your Honors have permitted a trial judge to override the decision of this Honorable Court. Your Honors have no such intention we feel certain. So the proper thing seems to be that upon reconsideration your Honors should grant certiorari. This should be done, even if the ultimate opinion here is that Marino should remain in the penitentiary. We don't see how your Honors can say any such thing without overruling 332 U.S. 561. Yet if such is to be the result, we hope that your Honors will agree that not only Marino but the rest of us, in prison and out, are entitled to a clear statement of the meaning of the mandate. The motions in this Honorable Court, which followed the opinion in 332 U.S. 561, show that the trial judge thought it meant the opposite of that considered by our Attorney General. Subsequent delays in the Illinois Supreme Court must mean that the Justices there feel that it is the busi-

ness of this Honorable Court to tell us all what is meant by the mandate.

Surely the mandate does not mean that which has been held by the trial judge, i.e., that he has the right to try the case over on the same evidence and to deprive Marino of federal rights previously established in this Honorable Court. Your Honors will remember that our Attorney General confessed error here and moved for the discharge of Marino when the mandate came down.

In *People* v. *Superior Court*, 234 Ill. 186 the Illinois Supreme Court issued certiorari and quashed a habeas corpus proceeding in the trial court. The judgment had previously been held good by the Supreme Court of Illinois and the trial judge had no jurisdiction to again try the questions of fact or law. There our Supreme Court exercised a supervision over the trial court, while holding that ordinarily the two courts had concurrent jurisdiction in habeas corpus matters.

In the case at bar, it seemed to us that our Supreme Court should have acted in the same manner, but in this case certiorari was denied. No reason was given for this denial by the Illinois Supreme Court. It may have been that the Illinois Supreme Court was of the opinion that our remedy was here by certiorari. But your Honors have now denied us that relief.

If your Honors do not see fit to grant a rehearing and continue to refuse to allow our petition for certiorari, may we ask for this—will your Honors please now say what is meant by the denial of certiorari? Does that mean that the trial judge was correct in his understanding of the mandate and that his judgment of the law and the evidence is correct.

The trial judge and our Attorney General in effect asked this question before the new trial. This court dismissed the motions filed for the purpose of obtaining a construction

of the mandate. We thought that the refusal to answer these questions was based upon the right Marino had to come here again, as he did, if the mandate was not obeyed.

But does the denial of certiorari mean that your Honors have spoken in 332 U.S. 561, and that if the trial judge has not seen fit to obey the mandate, the Illinois Supreme Court has the supervisory power necessary to correct the wrong?

If such be the opinion of your Honors, then the Illinois Supreme Court will no doubt, in the near future, construe the mandate and judge of the action of the trial court. In the absence of any statement by your Honors we do not believe that the Illinois Supreme Court will say anything one way or another about the meaning of the mandate. We fear that the Illinois Supreme Court will regard denial of certiorari as an affirmance here.

If your Honors will pave the way and then the Illinois Supreme Court should decide in favor of the trial judge and against Marino, we suppose that we might come here again for a final decision of the meaning of the mandate.

We trust that the issues involved and the complicated mess this case has become warrants us in asking your Honors to give it further attention. We refuse to believe that your Honors intend to be understood as holding that Marino is helpless to enforce those rights which have been adjudicated here.

Before acting upon this petition may we ask your Honors to again read *Marino* v. *Ragen*, 332 U.S. 561.

Respectfully submitted,

TONY MARINO,
*Petitioner.*

WM. SCOTT STEWART,
*Counsel for Petitioner.*

**Certificate.**

Wm. Scott Stewart, counsel for petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay. Petitioner is in the penitentiary.

WM. SCOTT STEWART,
*Counsel for Petitioner.*